Supreme Court, U. S.
FILED
AUG 24 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-124

EDWARD C. McINTYRE and CONNIE ELLEN McINTYRE,
Petitioners,

vs.

EVEREST & JENNINGS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ARTHUR A. BENSON, II
2525 Commerce Tower
Kansas City, Missouri 64105
(816) 842-7603

PAUL H. NIEWALD
NIEWALD, RISJORD & WALDECK
2500 Commerce Tower
Kansas City, Missouri 64105
(816) 842-3512
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Questions Presented for Review 1

Rules Involved 2

Statement of the Case—

Preliminary Statement 5

Supplemental Statement of Facts 5

Argument—

I. The Case Presents No Issue Of Exceptional Importance Regarding A Submission On Theories Of Negligence And Strict Liability 9

II. The Court Of Appeals' Decision Is A Correct Application Of The Provisions Of Rule 49 Of The Federal Rules Of Civil Procedure And Complies With The Accepted And Usual Course Of Judicial Proceedings In Jury Trials Submitted On Multiple Theories Of Liability 12

III. The Court Of Appeals' Opinion Does Not Depart From Previous Decisions Of The Same Court, Nor Does It Undermine A Plaintiff's Right To Trial By Jury 13

IV. The Court Of Appeals' Decision Is Consistent With The Accepted Standard Of Review Of A Trial Court's Denial Of A Motion For Judgment N.O.V. 14

V. The Court Of Appeals' Opinion Is Consistent With Missouri Law As It Existed When The Opinion In This Case Was Filed, As It Was When Petitioners' Motion For Rehearing Was Denied, And As It Now Exists 15

Conclusion 17

Appendix—Nunc Pro Tunc Order A1

Table of Authorities

CASES

Browder v. *Pettigrew*, 541 S.W.2d 402 (Tenn. 1976) 10, 11
Campo v. *Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (N.Y. App. 1950) 15
Coleman v. *Buehner*, 444 S.W.2d 16 (Mo.App. 1969) 15
Commissioner v. *Bilder*, 369 U.S. 499 (1962) 10, 13
Crumady v. *Joachin Hendrick Fisser, The*, 358 U.S. 423 (1959) 10, 11
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 11
Hasson v. *Ford Motor Co.*, 19 Cal.3rd 530, 564 P.2d 857, 138 Cal.Rptr. 705 (1977) 10
Keener v. *Dayton Electric Manufacturing Co.*, 445 S.W. 2d 362 (Mo. 1969) 12
Kerber v. *American Machine & Foundry Co.*, 300 F. Supp. 1205 (W.D.Mo.), *aff'd*, 411 F.2d 419 (8th Cir. 1969) 15
McAllister v. *United States*, 348 U.S. 19 (1954) 11
National Labor Relations Board v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) 13, 14
Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 13, 14
Rinker v. *Ford Motor Co.*, 567 S.W.2d 655 (Mo.App. 1978) 16
Rogers v. *Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) 14
Sterner v. *U.S. Plywood-Champion Paper, Inc.*, 519 F.2d 1352 (8th Cir. 1975) 13
Stevens v. *Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo. 1964) 15

RULES

Rule 19, Supreme Court Rules 2
Rule 49, Federal Rules of Civil Procedure 1, 3, 12, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-124

EDWARD C. McINTYRE and CONNIE ELLEN McINTYRE,
Petitioners,

vs.

EVEREST & JENNINGS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Does the case present issues of exceptional importance regarding a submission on theories of negligence and strict liability?

2. Is the court of appeals' decision a correct application of the provisions of Rule 49 of the Federal Rules of Civil Procedure and does it comply with the accepted and usual course of judicial proceedings in jury trials submitted on multiple theories of liability?

3. Does the court of appeals' opinion depart from previous decisions of the same Court, or does it undermine a plaintiff's right to trial by jury?

4. Is the court of appeals' decision consistent with the accepted standard of review of a trial court's denial of a motion for judgment N.O.V.?

5. Is the court of appeals' opinion consistent with Missouri law as it existed when the opinion in this case was filed, as it was when Petitioners' Motion For Rehearing was denied, and as it now exists.

RULES INVOLVED

Rule 19 of the Supreme Court Rules provides:

Rule 19. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

Rule 49 of the Federal Rules of Civil Procedure provides:

SPECIAL VERDICTS AND INTERROGATORIES

(a) Special Verdicts. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the Court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The Court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the Court may make a finding; or, if it fails to do so, it shall be

deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The Court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the Court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the Court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the Court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

STATEMENT OF THE CASE

Preliminary Statement

This product liability case does not involve any important and significant principles of law which are of importance to the general public. Nor does this case present any real and embarrassing conflict of opinion and authority between the several circuit courts of appeals. Instead, the nature of the questions presented by Petitioners together with the opinion handed down by the court of appeals show that Petitioners seek merely to have this Court review the evidence in the case and the inferences which Petitioners wish the Court to draw from such evidence.

The use of special verdicts in this case and the scope and nature of appellate review in connection with such use do not rise to the level of special and important reasons for granting a petition for writ of certiorari. Further, the court of appeals' decision in this case presents no question whatsoever on the availability of punitive damages in product liability cases. A review of the petition for writ of certiorari together with the court of appeals' decision in this case shows that the only risk Petitioners encountered here was that of failing to present sufficient evidence to support a verdict in their favor on the issue of negligence.

While it may be admitted that there is a current proliferation of product liability cases and that such cases are frequently submitted on multiple theories of recovery, there is no question in the instant case which requires resolution by this Court. Multiple submissions of liability in jury trials have been commonplace in the federal courts for quite some time. There is no indication that the federal

district courts and circuit courts of appeals are unaware of the proper procedure for the trial and appellate review of such cases, even in the area of product liability.

Supplemental Statement of Facts

Petitioners in this matter have set forth a statement of relevant facts to the issues presented for review on Petition for Writ of Certiorari. However, it is respectfully submitted that there are additional facts concerning the issues presented and that a better understanding of all the issues can best be obtained by setting forth additional relevant facts.

Everest & Jennings, Inc. was started in 1935 by Mr. Jennings who was a mechanical engineer and Mr. Everest who was a paraplegic. The particular commode in question was designed by Mr. Jennings and has been in use for thirty to thirty-five years, or since approximately 1941. The commode chair was originally tested by Mr. Jennings and according to Mr. Blickensderfer, president of Everest & Jennings, Inc., has continued to be evaluated since that date. Mr. Blickensderfer testified that in the designing and manufacturing of a product in their business, the product is not good if it will not serve a purpose and it must be useful to the user. There have been thousands of these chairs in the field for years with few complaints and in the judgment of Mr. Blickensderfer, some of the best evidence of proper design and function of the product is its continued successful use in the field.

Matthew Hall, merchandising manager for Everest & Jennings, Inc., had worked with the product in the field with patients and users of the product, and based upon its use in the field, stated that it is a stable product considering its use and function.

At trial Petitioners offered into evidence an owner's manual relating to a wheelchair and contained in that manual is a "helpful remark". The helpful remark advises a patient in using the wheelchair to rotate the wheels forward when entering or leaving the wheelchair which will, therefore, cause a less likelihood of the chair tipping and throwing the patient off balance. However, the use of the helpful remark in using the wheelchair is for transfer purposes and the manufacturer describes the use, function and the wheelchair as such as to constitute an entirely different product. Mr. Blickensderfer responded to the suggestion that the commode chair should have a similar helpful remark or a warning and stated that in any chair there is a point of balance and that in a wheelchair, because of the use made of the product and its shorter wheel base, a helpful remark is given for transfer purposes but that a similar remark or warning is not needed in using a commode chair.

Edward McIntyre suffered the spinal cord injury which rendered him a paraplegic in June 1968 when he was involved in a single-car automobile accident. He received treatment at the University of Kansas Medical Center, including rehabilitation as a result of that accident and injury. Mr. McIntyre received both physical therapy and occupational therapy as a part of his treatment. Further, Ed McIntyre received training with regard to acquainting himself with his physical limitations and sense of balance. He was first placed on a tilt table to again acquaint his body with being in an upright position after spending a number of weeks lying flat in a hospital bed. To develop his sitting balance and physical stamina, McIntyre then began mat work on a mat placed about the same distance off the floor as the seat of a wheelchair. He also worked with pulleys, dumbbells and other measures to strengthen and improve the muscles in his arms and

shoulders as well as to increase his physical stamina. At a later point in his treatment, McIntyre was trained in making transfers to a wheelchair and eventually in making transfers to a commode. He was also trained to fall due to the possibility of the serious injuries that can be sustained by a paraplegic in that circumstance. Finally, McIntyre was trained in the use of a patient aid called "reachers" which enabled him to pick up objects which could not be reached with his hands.

Edward McIntyre acknowledged at trial that as a part of growing up, he knew that if he leaned too far in a direction while seated in a castered chair, he could tip the chair and fall. This matter of common knowledge was learned by McIntyre prior to his automobile accident and the resulting physical disability. Moreover, as a part of his training at the University of Kansas Medical Center, he was taught to lean within the limitations of safety and that if the invalid sat too close to the front of a chair, it would cause him to pitch forward and fall.

Although trained in the use of a castered commode with caster locks at the University of Kansas Medical Center, McIntyre elected to acquire a commode without caster locks after leaving the University of Kansas Medical Center.

On July 5, 1970 and while seated in the castered commode manufactured and sold by Everest & Jennings, Inc., which he had used almost daily for about sixteen months, Mr. McIntyre leaned forward to pick up a toothbrush that he had dropped on the lavatory floor. Apparently, as his weight shifted forward, the commode tipped forward and McIntyre fell to the floor and sustained the injuries involved in this case.

ARGUMENT

I. The Case Presents No Issue Of Exceptional Importance Regarding A Submission On Theories Of Negligence And Strict Liability.

The Circuit Court of Appeals for the Eighth Circuit has held in this case that "[t]he jury's finding in favor of the defendant on the issue of strict liability precludes a finding of negligent design of an unstable commode or a negligent failure to perform tests of the commode's stability characteristics. . ." (App. A2) However, the court of appeals further pointed out that the finding for defendant on the issue of strict liability does not absolutely preclude a verdict for the plaintiff on other theories of negligence. (App. A2)

In attempting to harmonize the verdict for defendant on the issue of strict liability with the finding for plaintiff on one of the submitted theories of negligence, the court of appeals reasoned that the verdict in favor of plaintiffs could not be logically founded on either a theory of negligent design or a theory of negligent failure to perform tests on the product. What remained was the possibility of plaintiffs succeeding on either of the theories of negligent failure to warn or negligent failure to instruct the user of the risk of tipping the commode. After examining the record, the court of appeals held simply that there was not sufficient evidence in this case on either of the latter theories to support the jury's verdict in favor of plaintiffs. Clearly, the court of appeals did not hold that a finding for the defendant on the issue of strict liability *absolutely* precludes any finding of negligence on the part of the defendant. But under the facts of this case, the holding of the court of appeals was to the effect that a finding for the defendant on the issue of strict liability does

preclude a finding of negligence on issues of negligent design and negligent failure to perform tests on the commode's stability.

While it may be admitted that the issues decided by the court of appeals do have importance *in this case* (Pet. for Writ of Cert. 11), it has long been the rule in this Court that certiorari will not be granted merely to review "factual issues of consequence only in the particular litigation." *Crumady* v. *Joachim Hendrik Fisser, The*, 358 U.S. 423, 429 (1959) (separate opinion by Harlan, Frankfurter & Whittaker, J.J.). Moreover, because the adoption of the rule of strict liability in tort is a matter of state law and there remains a minority of states that have not adopted that rule of law, and because the federal courts are bound to follow the law of the forum state in cases based upon diversity jurisdiction, there can be no need for this Court to adopt a uniform rule for application in all federal courts in cases of this sort where state law is controlling. *Commissioner* v. *Bilder*, 369 U.S. 499, 501 (1962).

It seems quite clear that neither the law of Tennessee as announced in *Browder* v. *Pettigrew*, 541 S.W.2d 402 (Tenn. 1976), nor the law of California as stated in *Hasson* v. *Ford Motor Co.*, 19 Cal.3rd 530, 564 P.2d 857, 138 Cal. Rptr. 705 (1977), is controlling in the instant case. In its opinion, the court of appeals correctly noted that the issue decided in the foregoing cases has not been decided in the forum state of Missouri and that it was not bound to predict in what manner Missouri courts would rule on the issue. (Pet. for Writ of Cert. App. A5) Further, the court of appeals was unwilling to establish any such rule for application in Missouri. *Id.* Instead, the court of appeals simply sought to harmonize as much of the jury's verdict as was possible and then to review the evidence

on the issues that could not be reconciled to determine whether there was sufficient evidence to support the jury's verdict in favor of plaintiffs. When viewed in this manner, the decision of the court of appeals is clearly supportable under the state law of Missouri.

The court of appeals' decision in this case subjected plaintiffs only to the common and ordinary risk of failing to present sufficient evidence to support the jury's verdict in their favor. Whether the case is submitted on one or more than one theory of liability to a jury, there is nothing unique in plaintiffs' risk of failing to make a submissible case. And while the court of appeals refused to follow the reasoning in either the *Browder* or *Hasson* cases, that it chose to review the evidence on the submitted theories of negligent failure to warn and negligent failure to instruct with regard to the commode's stability characteristics shows that it tended to reject the absolute rule in *Browder* in favor of the more tempered reasoning set forth by the California court in *Hasson*.

It may therefore be concluded that petitioners herein simply desire to have the Court grant certiorari for review of the factual issues of consequence only in this particular litigation. The interpretation of facts bearing on the issue of negligence is not a consideration by which this Court exercises its discretionary jurisdiction in granting certiorari. *Dothard* v. *Rawlinson*, 433 U.S. 321, 338 (1977) (separate opinion by Rehnquist, J., Burger, C.J., & Blackmun, J.); *McAllister* v. *United States*, 348 U.S. 19, 23-25 (1954) (separate opinion by Frankfurter, J.,). The issues decided by the court of appeals do not command review by this Court.

II. The Court Of Appeals' Decision Is A Correct Application Of The Provisions Of Rule 49 Of The Federal Rules Of Civil Procedure And Complies With The Accepted And Usual Course of Judicial Proceedings In Jury Trials Submitted On Multiple Theories Of Liability.

A cursory review of the court of appeals' opinion in this case shows that Senior Judge Harper correctly considered that this case was submitted on special verdicts as governed by Rule 49(a) of the Federal Rules of Civil Procedure rather than as being submitted on special interrogatories as described in Federal Rule of Civil Procedure 49(b). It must again be pointed out that although the jury was not required to state the basis for its verdict on either strict liability or negligence, the finding for defendant for the submitted theory of strict liability logically precluded a finding for plaintiffs on the submitted theories of negligent design and negligent failure to perform tests on the commode's stability. Petitioners have not challenged the jury's verdict on the matter of strict liability.

The reasoning of the court of appeals belies petitioners' assertion that it speculated as to the basis for the jury's verdict on the several submitted theories of liability. When attempting to harmonize the jury's verdict, the court of appeals simply followed the plain, ordinary and unambiguous language of Restatement (2nd) of Torts Section 402(a) as it had been adopted in Missouri in *Keener* v. *Dayton Electric Manufacturing Co.*, 445 S.W.2d 362, 364 (Mo. 1969). Petitioners have pointed to no Missouri authority to support their interpretation of the rule of strict liability. Further, petitioners acknowledge that the rule they would have this Court apply is that adopted by the California Supreme Court and that such a rule is a "departure from the essential elements set forth in 402(a)". (Pet. for Writ of Cert. 14)

Respondents reiterate that the decision of the court of appeals is supportable as a matter of Missouri law and that the reasoning in the several decisions of California courts is not controlling in this case. To grant certiorari in this instance would simply involve this Court in making an independent review of the evidence and a discussion of specific factual issues already reviewed by the court of appeals. This is not a sufficient showing of special and important reasons to justify a grant of certiorari. *Commissioner* v. *Bilder*, 369 U.S. at 501; *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-79 (1955); *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951).

III. The Court Of Appeals' Opinion Does Not Depart From Previous Decisions Of The Same Court, Nor Does It Undermine A Plaintiff's Right To Trial By Jury.

The court of appeals' opinion as revised by its *nunc pro tunc* order of August 14, 1978 shows that its decision is consistent with the previous decision of that same Court in *Sterner* v. *U.S. Plywood-Champion Paper, Inc.*, 519 F.2d 1352 (8th Cir. 1975), where it upheld a jury finding of negligence for failure to warn despite the jury's rejection of plaintiff's strict liability theory. (App. A2)

Rule 49(b) of the Federal Rules of Civil Procedure is concerned with general verdicts accompanied by answers to interrogatories. As noted above, the instant case was submitted on special verdicts as considered in Rule 49(a). It is therefore not possible that the opinion of the court of appeals in this case violates the provisions of Rule 49(b). There is nothing to indicate that the court of appeals considered the special verdicts returned in this case were in the nature of special interrogatories. Had it been otherwise with the verdicts being accompanied by answers to

interrogatories, the courts and parties to this action would have had the benefit of the jury's reasoning underlying their verdicts.

Because Rule 49(a) does not provide for the granting of a new trial, the court of appeals was under no compulsion to remand the case for a new trial. In following the rule that the courts are under a duty to make every reasonable effort to harmonize special verdicts returned by the jury, the court of appeals' decision was consistent with its own previous decisions as well as decisions of this Court. (App. A2)

IV. The Court Of Appeals' Decision Is Consistent With The Accepted Standard Of Review Of A Trial Court's Denial Of A Motion For Judgment N.O.V.

Petitioners admit that the court of appeals was cognizant of the rule that in considering the question of whether plaintiffs made a submissible case on their negligence theory, plaintiffs were entitled to have all of the evidence viewed in the light most favorable to them and they were entitled to rely on all reasonable inferences which could be drawn from the evidence. (Pet. for Writ of Cert. 17-18) In asserting that the court of appeals paid "lip service" to that rule but failed to follow it, petitioners merely challenge the court of appeals' review of the evidence and specific factual issues presented in the case and seek to have this Court again consider that which will not be considered in deciding whether to grant certiorari. *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 524-548 (1957) (separate opinion by Frankfurter, J.); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. at 73-79; *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. at 502-503. There is therefore no special and important reason in this portion of petitioners' argument sufficient to sustain petitioners' request for review on certiorari.

The court of appeals relied upon the decision in *Kerber* v. *American Machine & Foundry Co.*, 300 F.Supp. 1205 (W.D.Mo.), *aff'd*, 411 F.2d 419 (8th Cir. 1969), which in turn relied upon the reasoning in *Stevens* v. *Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo. 1964) for the rule of law to be applied in Missouri in cases submitted on theories of either negligent failure to warn or failure to instruct. In *Stevens* the Supreme Court of Missouri relied in part upon the reasoning in *Campo* v. *Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (N.Y.App. 1950). Decisions in several other jurisdictions were also relied upon. That the *Campo* doctrine has now been rejected by the highest court of New York is no authority for the proposition that the Supreme Court of Missouri has rejected the reasoning announced in the *Stevens* case. The thoroughly researched opinion of the court of appeals shows that Missouri appellate courts have continued to follow the decision in the *Stevens* case several years after the *Campo* doctrine was rejected in New York. See *Coleman* v. *Buehner*, 444 S.W.2d 16 (Mo.App. 1969). Thus, the court of appeals' decision is again supported by the applicable law of the forum state.

V. The Court Of Appeals' Opinion Is Consistent With Missouri Law As It Existed When The Opinion In This Case Was Filed, As It Was When Petitioners' Motion For Rehearing Was Denied, And As It Now Exists.

The decision in this case was handed down by the United States Court of Appeals for the Eighth Circuit on February 13, 1978. In its opinion the court of appeals noted that the courts of Missouri had not as yet decided upon the issue of inconsistencies in verdicts finding for the defendant on a strict liability theory and for plaintiff on theories of negligence. (Pet. for Writ of Cert., App. A5) The court of appeals' Order denying the petition for re-

hearing was dated April 25, 1978. Five days later, the Missouri Court of Appeals decided the case of *Rinker* v. *Ford Motor Co.*, 567 S.W.2d 655 (Mo.App. 1978). Thereafter, Petitioners filed a "Motion for Reconsideration of Motion for Petition for Rehearing En Banc" which was denied by the court of appeals on May 16, 1978.

In *Rinker* it was held that there was no legal inconsistency between a finding against the defendant on the negligent failure to warn theory and a finding for defendant on the strict liability theory. *Id.* at 660. This holding is consistent with the court of appeals' decision in the instant case. However, unlike the instant case, there was evidence in *Rinker* sufficient to permit the jury to find that the defendant took no steps to warn its customers of a problem with the product. *Id.* at 667. Thus, even though the *Rinker* case was decided after the court of appeals' opinion herein had been handed down and the motion for rehearing denied, the decision in this case would have been no different even if the *Rinker* decision had been available to the court of appeals.

And although the *Rinker* case also provides an affirmative answer to what the court of appeals in this case described as "a novel question under Missouri law as to whether punitive damages are available in product liability actions", the court of appeals correctly declined to reach that issue here because the evidence was not sufficient to support any recovery by plaintiffs. (Pet. for Writ of Cert., App. A10)

CONCLUSION

For the foregoing reasons, respondent respectfully submits that there are no special and important reasons which justify the grant of a writ of certiorari by this Court under Rule 19 of the Supreme Court Rules. The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR A. BENSON, II
2525 Commerce Tower
Kansas City, Missouri 64105
(816) 842-7603

PAUL H. NIEWALD
NIEWALD, RISJORD & WALDECK
2500 Commerce Tower
Kansas City, Missouri 64105
(816) 842-3512

Attorneys for Respondent

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

77-1198

Edward C. McIntyre and)
Connie Ellen McIntyre,)
Appellants,)
vs.)
Everest & Jennings, Inc.,)
a California Corporation,)
Appellee.)

77-1244

Edward C. McIntyre and)
Connie Ellen McIntyre,)
Appellees,)
vs.)
Everest & Jennings, Inc.,)
a California Corporation,)
Appellant.)

Appeals from the United States District Court
for the Western District of Missouri

Before BRIGHT and ROSS, Circuit Judges, and HARPER,
Senior District Judge.

NUNC PRO TUNC ORDER

The second full paragraph on page 7 of the slip opinion filed in this case on February 13, 1978 is modified to read as follows:

> The jury's finding in favor of the defendant on the issue of strict liability precludes a finding of negligent design of an unstable commode or a negligent failure to perform tests of the commode's stability characteristics in this particular case. The only basis upon which the jury's verdict could lie is either in a failure to warn or instruct on the commode's propensity to tip when the user leaned forward.[1]

---

1. We have recognized in different circumstances that a jury's rejection of plaintiff's strict liability theory premised on a design defect need not be inconsistent with a finding of negligence. *See Sterner* v. *U.S. Plywood-Champion Paper, Inc.*, 519 F.2d 1352, 1354-55 (8th Cir. 1975).

August 14, 1978